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MEMORANDUM OF LAW

DATE: June 4, 2001
TO: Honorable Mayor and City Council Members
FROM: City Attorney
SUBJECT: San Diego Gas & Electric Franchise Amendments

INTRODUCTION

On June 5, 2001, the City Council will be considering the adoption of an ordinance amending the current electric and natural gas franchise agreements with San Diego Gas & Electric [SDG&E]. A private citizen has written to the City Council questioning the legality of the procedures used to adopt the ordinance. A copy of the letter from the citizen is enclosed as Attachment A.

QUESTION PRESENTED

Must the adoption of an ordinance amending certain provisions of the electric and natural gas franchises between the City and SDG&E follow the procedures for the grant of a franchise set forth in San Diego Charter section 103?

SHORT ANSWER

No. The City Charter distinguishes between the grant of franchises, and renewals, extensions and amendments to franchises for purposes of the procedures to be followed. Grants of franchises may only be made by ordinance adopted by 2/3 of the members of the City Council and then only after the City Manager makes recommendations, an opportunity for free and open competition is allowed, and public hearings have been given. Amendments to franchises, while needing a 2/3 vote of the City Council, need not require the other procedural elements.

BACKGROUND

Pursuant to Charter section 103, the City has granted to SDG&E two franchises; for the transmission of electricity and natural gas. Those agreements currently contain a re-opener provision, pertaining solely to the percentage of the franchise fee, which began six months prior to the expiration of the first thirty years of the agreement, or July 17, 2000. The current franchises contain language allowing the parties to agree to a six month extension of the re-opener period. The parties agreed to such an extension last year, and the re-opener is currently set to expire on July 17 of this year.

The parties have been negotiating pursuant to the re-opener but agree that an additional six months is necessary and appropriate to complete negotiations and prepare necessary documentation. Accordingly, the City Manager and City Attorney are recommending that the franchise agreements be amended to provide that the re-opener continue for a period not exceeding one year (rather than six months), or until January 17, 2002. The amendment will mean that the franchise fee paid by SDG&E for the right to use the public rights-of-way will remain at 3% of defined gross revenues through the extended re-opener period.

ANALYSIS

Charter section 103 reads as follows in pertinent part:

“The Council shall have the power to grant to any person, firm or corporation, franchises, and all renewals, extensions and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants shall be made by ordinance adopted by vote of two-thirds (2/3) of the members of the Council and only after recommendations thereon have been made by the Manager and an opportunity for free and open competition and for public hearings have been given. No ordinance granting a franchise or a renewal, extension or amendment of an existing franchise shall be effective until thirty days after its passage,

Clearly the Charter distinguishes between the grant of a franchise, and its renewal, extension or amendment.

Charters should be construed according to the natural and ordinary meaning of their words. *Amador Valley Joint Union High School District v. State Bd. of Equalization*, 22 Cal. 3d 208, 245 (1978). In addition, because the Charter specifically applies certain procedural requirements to the grant of a franchise, while distinguishing renewals, extensions and

amendments, it must be presumed that the procedural requirements for the grant of a franchise do *not* apply to such renewal, extensions or amendments. *Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993). Accordingly, we conclude that the procedural requirements of Charter section 103 do not apply to the proposed amendments of the existing franchise agreements. However, as the franchises required a two-thirds (2/3) vote when initially granted, any amendment must also be adopted by a two-thirds (2/3) vote.

CONCLUSION

The Charter clearly distinguishes between the grant of franchises, and their renewal, extension or amendment. The Charter imposes certain procedural requirements on the grant of franchises, but the lack of plain language imposing those same requirements on renewals, extensions or amendments compels a conclusion that such requirements do not apply. The normal procedural requirements for the adoption of ordinances, including in this case the need for a two-thirds (2/3) vote, do apply, however.

CASEY GWINN, City Attorney

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Enclosure
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